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Office-Supreme Court, U.S.
FILED
MAY 9 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 826

COMMISSARIAT A L'ENERGIE ATOMIQUE, Assignee of Patent Applications of JEAN HENRY HALBAN, JEAN FREDERIC JOLIOT and LEW KOWARSKI, *Petitioner*

v.

ROBERT C. WATSON, Commissioner of Patents, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

REPLY MEMORANDUM FOR PETITIONER

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May 6, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner or its assignors have received patents in most countries of the world on the inventions here involved—inventions which relate to one of the most far reaching technological developments in the history of man. In the United States, however, they have consistently been unable to obtain a determination of their

claims on their real merits. Instead, they have been confronted with a never-ending series of procedural, technical and jurisdictional objections.

In these circumstances, for respondent to oppose certiorari on the ground that the decision below "is essentially one of fact" (Br. in Opp., p. 6) is less than candid. Petitioner seeks certiorari for the very reason that the court below did not consider and decide the relevant facts, but rested its decision on a misapplication of the doctrine of *res judicata,* which was held to preclude inquiry into facts otherwise relevant. If this Court has jurisdiction to issue the writ, the case is clearly one which warrants exercise of the jurisdiction.

As the Brief in Opposition makes plain, the question of this Court's jurisdiction to issue a writ of certiorari to the Court of Customs and Patent Appeals in patent and trademark cases* is itself an important question which deserves full consideration by this Court upon brief and oral argument.** Although the Government asserts that the issue was disposed of by the *California Fig Nut* case, decided in 1927, the issue continues to arise. The Government has cited no less than 8 petitions for certiorari in 10 years presenting the question, all of which have been denied without indication from the Court whether the denial rested on jurisdictional grounds or on the merits. Moreover, this Court has never considered the effect, on the question of jurisdiction, of the provision of the 1958 Judicial Code, accord-

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* There is no doubt of its jurisdiction to do so in customs cases.

** Petitioners suggest that such consideration could appropriately be given, either by postponing the question of jurisdiction to the merits, or by setting the matter down for further briefing and oral argument on the petition.

ing to Court of Customs and Patent Appeals the status of a constitutional court, or the 1948 revision of the Judicial Code providing, without qualification or limitation, that "cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari."

Above all, it is significant that the Government cites no consideration of logic or policy in support of its assertion that decisions of the Court of Customs and Patent Appeals in patent and trademark cases constitute an exception to this Court's general jurisdiction to review the decisions of inferior federal courts. Such asserted exception cannot rest in the nature of the court, which has been declared by Congress to be a constitutional court and whose decisions in other areas are reviewable by writ of certiorari. Nor can it rest in the nature of the issues, for exactly the same issues are reviewable by this Court when they arise in an action brought in the United States District Court under 35 U.S.C. § 145. Congress has provided two parallel routes for review of decisions of the Patent Office denying a patent in whole or in part. The effect of the Government's contention is that a litigant who chooses review by the Court of Customs and Patent Appeals under 35 U.S.C. § 141 must thereby forego any possibility of review by this Court, whereas one who chooses review by the District Court under 35 U.S.C. § 145, preserves the possibility of such review. No reason is, or can be, suggested for such an anomaly.

The effect of the asserted exception is to weaken this Court's authority to supervise the course of decision of federal courts and to resolve conflicts between them. In the Government's view, if a direct conflict should arise between a United States Court of Appeals and

the Court of Customs and Patent Appeals on a question of interpretation of the patent laws,* this Court would have power to review and correct the decision of the Court of Appeals and not that of the Court of Customs and Patent Appeals. And if an unseemly conflict of jurisdiction or practice should arise between such courts, this Court can review the actions of one party to the conflict and not the other.

The present case vividly illustrates the difficulties thereby created. It reflects a disagreement between the Court of Appeals for the District of Columbia—which regards the decisions in Cases I and II as subject to reconsideration—and the Court of Customs and Patent Appeals—which regards them as finally foreclosed. It reflects a clear failure on the part of the Court of Customs and Patent Appeals to give proper respect to the decision of the Court of Appeals. In this situation the Government's view is that this Court has power to deal with only one of the two courts involved. It could have revised and corrected the decision of the Court of Appeals had a petition been timely filed seeking review of that decision; but it has no authority to revise and correct the decision of the Court of Customs and Patent Appeals. This stultifying position, we submit, should be sustained only if compelled by the most explicit and unequivocal statu-

* In *Application of Blaisdell*, 242 F. 2d 779 (C.C.P.A. 1957) and *Watson* v. *Allen*, 254 F. 2d 342 (App. D.C. 1958) the two courts reached opposite conclusions on the identical facts as to whether certain activities constituted a public use which barred issuance of a patent. In the *Allen* case the Court of Appeals for the District of Columbia stated at p. 347, "Our holding with respect to public use cannot be reconciled with that of the Court of Customs and Patent Appeals." Certiorari was not applied for in either case.

tory language; here the statute (28 U.S.C. § 1256) on its face affirmatively refutes the Government's contention.

Respectfully submitted,

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